

**Board of Alien Labor Certification Appeals**  
United States Department of Labor  
Washington, D.C.

**'Notice: This is an electronic bench opinion which has not been verified as official'**

DATE: February 25, 1997

CASE NO: 95-INA-252

**In the Matter of:**

**THE CELLAR CAFE,  
Employer,**

**On Behalf of:**

**NAIM BEGIM,  
Alien**

Appearance: Eliezer Kapuya, Esq.  
Los Angeles, California, for the Employer and the  
Alien

Before: Huddleston, Holmes, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of the Naim Begim (Alien) filed by The Cellar Cafe (Employer), pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco denied this application, the Employer requested review pursuant to 20 CFR § 656.26. This decision is based on the record upon which the CO denied certification and on the Employer's request for review, as contained in the Appeal File (AF), and the written arguments of the parties. 20 CFR § 656.27(c).

**Statutory authority.** An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application

and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. See 8 U.S.C. § 1182(a)(5)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the employer's efforts to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

### STATEMENT OF THE CASE

**Application.** On December 5, 1992, the Employer filed an application for labor certification to enable the Alien, an Israeli national, to fill the job of "Cook, Kosher Middle Eastern Foods," which the CO classified as "Sandwich Maker," Occupational Code 317.664-010. See the Dictionary of Occupational Titles of the Employment and Training Administration, U. S. Department of Labor.<sup>1</sup> AF 45-46, 110-111. Employer's application initially described the position as follows, "Will cook and prepare varieties of Kosher Middle Eastern Foods." AF 45. In a letter dated February 10, 1993, which was countersigned by the Employer, the applicant noted that this job is similar to job listed under DOT 313.361-030 and amended its application to describe the position as follows:

Will plan menu and cooks (sic) Iraqui style dishes, dinners, desserts according to recipes. Will prepare meats, soups, sauces, vegetables and other foods prior to cooking. Will season and cook food according to prescribed methods. Will portion and garnish foods.

AF 102. This revised description closely followed the criteria for DOT 313.361-030, which mentions and expressly encompasses, inter alia, a job classified by title as "Cook, Kosher-Style Food (hotel & rest.)" AF 103.<sup>2</sup> Employer required two years experience in the job offered, but stated no educational requirement. AF 045.

**Report of Recruitment Results.** Employer reported on October 12, 1993, that its effort to recruit workers for this position resulted in referrals and applications for Morris Levine, Lynette

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<sup>1</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor, 1977 edition, as amended.

<sup>2</sup>The record also includes a copy of the menu and information as to the hours and days the restaurant is open for business, its seating capacity, and the average number of patrons each day. AF 48, 100-102, 105, 107.

Johnson, and Saada Shakershi. AF 51-55. Employer observed that Levine and Johnson did not call or show interest in the job, and that Shakershi was interviewed. This candidate was able to work only parttime and, in addition, was found "not acceptable for the position because of her lack of knowledge of Koshrut dietary laws." AF 55.

**Notice of Finding.** The April 19, 1994, Notice of Finding (NOF) advised the Employer that unless the rebuttal by Employer corrected the defects noted, the CO would deny certification. The CO found (1) that the Employer's application contained a restrictive requirement, (2) that the position was advertised defectively, and (3) that the Employer had failed to provide the required notice of the application for labor certification.

1. Under 20 CFR § 656.21(b)(2)(i)(A), the CO found the requirement of two years of experience to be unduly restrictive and that this level of experience is not normally required for the successful performance of the job in the United States. By way of explanation, however, the CO said,

Upon review of the nature of employer's job duties, the Certifying Officer determines the position most closely approximates the occupation of Sandwich Maker(DOT 317.66-4010)(sic). In addition, the menu that employer submitted clearly shows that the employer is a kosher deli supervised by the Rabbinical Council of California.

The CO rejected the Employer's description of the position as "Cook, Specialty, Foreign Food (DOT 313.361-03)," and continued by redefining the description and duties of this job, saying,

The SVP (Specific Vocational Preparations) from the selected Characteristics of Occupations defined in the Dictionary of Occupational Titles is: Sandwich Maker. This occupation shows a SVP of 2: Anything beyond short demonstration up to and including 30 days. This SVP represents the amount of time required to learn the techniques, acquire information, and develop the facility needed for the average performance in a specific job-worker situation.

AF 37. The CO then found the requirement of two years of experience to be restrictive, and directed the Employer to delete this experience criterion and retest the labor market subject to appropriate procedures required by the regulations. In the alternative, the CO directed that the Employer justify the experience requirement based on business necessity. AF 37-39.

2. Under 20 CFR § 656.21(g) the CO found that the Employer's advertisement lacked specificity, stating that

In this particular instance, the test of the advertisement did not describe the job with particularity. Employer's advertisements dated August 10, 11, and 12, 1993, were advertised under the heading of Cook which is incongruent with the correct job title of Sandwich Maker. Therefore, we cannot conclude that the employer met his responsibility to show that qualified able and willing U. S. workers were not available for his job opportunity.

AF 39. The CO said the Employer should readvertise the job opportunity "under the correct heading of Sandwich Maker and must describe the job with particularity." The CO then explained the regulatory process that the Employer was required to follow in readvertising the position. AF 40-41.

3. Finally, the objection that the Employer had failed to provide notice of the job opportunity was again related to the CO's finding that the job title should have been designated as "Sandwich Maker" and not "Cook, Specialty, Foreign Food." The CO added that "the job should be noted with particularity as to job duties commensurate with the submitted menu." Once more the CO stated the terms and conditions of the job, the requirements of the position, the prevailing wage, and the method of application in the remedial instructions. AF 42-43.

**Rebuttal.**<sup>3</sup> The sole issue raised in Employer's rebuttal is whether the job opportunity is for a "Cook, Specialty, Foreign Food" (DOT 313.361-03), as stated in the application, or for a "Sandwich Maker" (DOT 317.664-010), as construed by the CO in the NOF. AF 36-37, 45, 102. At ¶ 317.684-018 the DOT described a "sandwich maker" as a sandwich counter attendant for hotel and restaurant, saying this worker

Prepares sandwiches to individual order of customers: Slices cold meats and cheese by hand or machine. Cuts bread and sandwich buns and toasts them on grill or in electric toaster, when requested. Butters bread and places meat or filling and garnish, such as chopped or sliced onion and lettuce, between bread slices. Prepares garnishes for sandwiches, such as sliced tomatoes and pickles. May cook, mix and season ingredients to make dressings, fillings, and spreads. May fry hamburgers, bacon, steaks, and eggs for hot sandwiches.

Based on this DOT entry, the CO's statement that the job offered by the Employer "most closely approximates the occupation of Sandwich Maker" appears to rely heavily on the menu that the

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<sup>3</sup>While the rebuttal was signed by counsel and not by the Employer, the written statement by Mr. Saltzberg, the owner, is documentation of the facts it asserts. AF 17.

Employer submitted.<sup>4</sup> The CO's analysis expressly contradicts the Employer's otherwise uncontested representation that the worker,

Will plan menu and cooks (sic) Iraqui style dishes, dinners, desserts according to recipes. Will prepare meats, soups, sauces, vegetables and other foods prior to cooking. Will season and cook food according to prescribed methods. Will portion and garnish foods."<sup>5</sup>

Employer filed a copy of its restaurant and catering menu as rebuttal documentation in support of its disagreement with the conclusion in the NOF "that The Cellar Cafe is only a sandwich shop and not a catering restaurant." AF 15, 16. Noting that the Employer is the only restaurant and caterer located inside the Jewish Federation Building of Greater Los Angeles, it pointed out that this site is the local headquarters for most of the world Jewish organizations that are represented in Los Angeles. As an overwhelming portion of Employer's gross sales are from kosher catering, it emphasized that the menu did not reflect the range of foods that Employer offers as a caterer and relied for documentation on catering orders, an invoice, and a delivery menu to support an inference that Employer's specialty is Middle Eastern food. AF 17.<sup>6</sup>

The Employer then said that the preparation of several menu items requires the work of a full time cook. Its brief noted that several hours are required to prepare and bake the dough to make burakus, a Sephardic Jewish food that is "very hard to prepare and make." Similar comments were offered as to such menu items as "islander," "garden pearl in a shell," humus, tahini, tabouli, rice pilaf, and cooked vegetables. Arguing that its primary business is catering, Employer asserted that it is "a major restaurant and caterer" and cannot exist without employing fulltime cooks. AF 11-12.

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<sup>4</sup> The CO said this menu "clearly shows that the employer is a kosher deli supervised by the Rabbinical Council of California." While the language of DOT ¶ 317.684-018 broadly describes the duties of a "sandwich counter attendant" for hotel and restaurant, this kosher restuarant is operated under the mandate of a Higher Authority that is unrelated to the Act and regulations. As the Employer is required to comply with kashruth rules enforced by the Rabbinical Council of California, it is unlikely that Employer would allow a sandwich maker or cook or any other food worker to "fry bacon" or to butter bread and then place meat between the buttered bread slices.

<sup>5</sup> Compare analogous facts presented in **LDS Hospital, Dept. of Medical Information**, 87-INA-558(April 11, 1989)(en banc), where BALCA found that the CO erred in assigning the occupational title. .

<sup>6</sup> Except for the addition of chicken fajitas and babaganoogh, the items offered by Employer as a caterer were found to be essentially the same as those it listed in its menu, however. AF 15-16, 18-25, 100-101.

**Final Determination.** On August 17, 1994, the CO's Final Determination again concluded that Employer did not meet the criteria of 20 CFR Part 656 for the reasons stated above, and the CO denied certification under the Act and regulations. AF 06-08. Citing the regulation subsections identified in the NOF, the CO again said the Employer was a kosher delicatessen and not a "catering restaurant," and that the experience requirement of two years in the job was restrictive, in that the Employer's needs meet DOT criteria for a Sandwich Maker, rather than for a cook. The CO concluded (1) that Employer's requirement of two years' experience was restrictive, (2) that its advertisements and posted notice failed to describe the job of Sandwich Maker correctly, and (3) Employer had failed to take corrective action directed by the NOF. AF 06-08.

Employer then appealed this decision on grounds that (1) the CO incorrectly applied the law to the facts of this case and that (2) the CO denied certification "on his personal biases and not based on the prevailing facts of this case." Contending that the denial was not grounded, Employer requested reversal. AF 01.<sup>7</sup>

### Discussion

It is well-established that the CO must weigh the evidence and rebuttal before reaching a conclusion in classifying positions under the DOT. **Exxon Chemical Company**, 87-INA-615(July 18, 1988)(en banc)<sup>8</sup>. As the CO's reasons for denying Employer's application are based entirely on the CO's classification of the job opportunity under the DOT criteria, the documentation was reexamined to determine whether the CO's job classification was correct. If error is found, the remedy must provide relief in terms appropriate to the facts of this case. **Transgroup Services, Inc.**, 88-INA-428(Feb. 21, 1990).<sup>9</sup> When the duties described in Employer's ETA Form 750A were reexamined the Final Determination failed to yield a credible reason for the finding that the duties of the position stated in the application and record were closer

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<sup>7</sup>As the CO did not find any defect in the Employer's recruitment process other than the fundamental failure to describe the job opportunity correctly, none may be considered.

<sup>8</sup>Also see **Yedico International, Inc.**, 87-INA-740(Dec. 20, 1988).

<sup>9</sup>See **Foria International, Inc.**, 88-INA-375(July 27, 1989), where BALCA found the CO had misclassified the job, reversed the CO's denial, and granted the certification requested.

to the DOT job description for a Sandwich Maker than to the usual work of a Cook. **A.D.M. Corporation**, 90-INA-180(Dec. 12, 1991).<sup>10</sup>

The CO's classification of the Employer's job offer was reconsidered in terms of both the DOT criteria and the foods actually served in its restaurant. First, the menu on which the CO's conclusion is based lends support to Employer's job description by listing three different kinds of soup, all of which include some form of meat as an ingredient. Second, the pita sandwiches noted in the menu also require the cooking of chicken, turkey, and corned beef that were primary ingredients. This is relevant in that both the CO and Employer agreed that Employer's restaurant operates under the supervision of the state recognized religious authority for kosher food service. From this it is inferred that all of the meats mentioned by the menu required a Cook to have and use a knowledge of kosher religious practices in preparing, cooking, serving, and storing these meats and the meat-based salads made from them. AF 100-101.<sup>11</sup> The fact that the parties agree that the menu is, itself, basic evidence from which to infer the experience and skills needed for this job is persuasive that the documentation supports the conclusion that something more than sandwich assembly is involved in the work of the job that the Employer offered.

Moreover, in addition to the cooked meats Employer's menu offered the diner a "burakus," which it described as a "pastry filled w/spinach or potato," in addition to other baked products. While the record does not indicate whether a Cook prepares this item, there is no evidence to the contrary, and the CO's analysis adopted the menu as a definitive delineation of the position at issue.<sup>12</sup> It follows that a further inference may be drawn that

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<sup>10</sup>While the issue arises from the contention that the CO failed to consider what the worker actually would be required to do in the Employer's business, it is observed before comparing the two position descriptions that, even though Employer repeatedly emphasized in rebuttal and in other communications to the CO that it was a catering restaurant and not a sandwich shop, the CO insisted upon calling Employer's business a "kosher deli." The CO's persistence in employing such slang terminology as an official classification in formal orders of the Department of Labor in spite of Employer's objections to this usage suggests the inference that the CO failed to consider, address, and weigh the documentation and arguments incorporated in Employer's rebuttal before issuing the Final Determination. **Standard Oil Company**, 88-INA-77(Sept. 14, 1988).

<sup>11</sup>It is common knowledge that kosher food service management requires that the ritually correct procedures be followed in all phases of the preparation, service, storage, and handling of meat and meat products, and that all plates, utensils, and cooking equipment that touches the meat must be kept separate from the dairy products in Employer's establishment.

<sup>12</sup>While Employer's counsel described the cooking process in the brief, there is no document of record that is signed by the Employer. Although the attorney's information is interesting and helpful, it is not evidence of record.

the duties of this position include the baking of the burakus, as well as other cooked food preparation.

Finally, the salad section of the menu listed "humous -- ground chick peas," "tahina -- ground sesame seeds," "eggplant and tomato -- sauteed with onions & sweet spices," "eggplant & tahina," "garlic & mayo eggplant," "vinegar & garlic eggplant -- whole slices of eggplant marinated in garlic and vinegar," "taboule -- (cracked wheat & onions)," "egg salad," "tuna salad," "chicken salad," "pasta salad (creamy or vinegar)," "carrot slaw (walnuts & raisins)," "cole slaw," and "israeli salad."<sup>13</sup> From this part of the menu it is again inferred that the skills of a Cook are required to prepare the ingredients of these salads in the absence of evidence to the contrary. For one example, logic suggests that the chicken used in the chicken salad on the menu is the same raw ingredient that was cooked to make the chicken broth that the Cook used as the liquid medium for the matzoh ball soup. By similar analysis it is also reasoned that the sauteed eggplant and the marinated eggplant used in the other cold dishes were prepared by a Cook and not by a Sandwich Maker assembling sandwiches at the delicatessen counter.

It follows that the CO was wrong in finding that all of the items in the Employer's menu can be prepared by a "SANDWICH MAKER (hotel & rest.) sandwich-counter attendant," under the criteria of DOT 317.684-018. For these reasons the specific foods offered in the menu clearly document the need for experience or training that is different from the background required to put together and serve a sandwich, as described in a classification based on the DOT entry, in spite of the CO's contrary assumptions in the NOF and Final Determination. Thus, Employer's menu established in concrete examples that the work of a Sandwich Maker in adding matzoh balls before serving bowls of chicken soup or in putting other ingredients into a pita sandwich or a salad after they have been cooked and processed is self-evidently not enough to meet the needs of the position offered. Consequently, it is found that the two jobs are different in that the Restaurant Cook is required to assemble, prepare, and cook the raw ingredients, as explained in Employer's amended application, while a Sandwich Maker makes use of such prepared primary components to assemble servings into sandwiches and other forms for delivery to the restaurant patrons, either in the cafe or in catered service.

**Conclusion.** As the CO erred in classifying this position as a Sandwich Maker, the Employer is entitled to a remedy under the Act and regulations. AF 45-46. The first consideration is that

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<sup>13</sup>In addition, to these items the Employer listed a few combination plates that included the listed salads as choices.



the Employer duly advertised and engaged in the recruitment of a Restaurant Cook, all of which the CO determined to be incorrect by misclassifying the job that Employer advertised. Employer's report on its recruitment efforts was thereafter duly considered by the CO and was passed in the NOF without objection, subject only to the CO's misclassification of the job. From this it is reasoned that the Employer has, in fact, tested the labor market and has performed the steps required by the Act and regulations, subject only to the CO's erroneous finding that the advertised position was not correctly stated. It follows that the Employer has completed its regulatory obligations under the administrative process and that no further action is required before the request for certification can be granted under the Act and regulations.

Accordingly, the following order will enter.<sup>14</sup>

### ORDER

1. The Certifying Officer's denial of labor certification is hereby reversed.

2. This application is remanded to the Certifying Officer with directions to issue the certification requested by the Employer's application, as authorized by the Act and regulations.

For the Panel:

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FREDERICK D. NEUSNER  
Administrative Law Judge

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<sup>14</sup>See order in **Foria International, Inc.**, supra.

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

## BALCA VOTE SHEET

Case Name: **THE CELLAR CAFE**, Employer,  
**BEGIM NAIM**, Alien

No: 95-INA-252

PLEASE INITIAL THE APPROPRIATE BOX.

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Thank you,

Judge Neusner

Date: January 29, 1997.